

copy
127IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JOHN RICHARD JAE,

Plaintiff,

v.

KENNETH D. KILMER, et al.,

Defendants.

CIVIL No. 1:00-CV-00315

U.S. District Judge Raimo

Magistrate Judge Emeyer

FILED

HARRISBURG, PA

JUN 27 2001

MARY EDD'ANDREA, CLERK
Per actBRIEF IN SUPPORT OF MOTION TO COMPEL DISCOVERYI. STATEMENT OF THE CASE

This is a 3193 action filed by Plaintiff John Richard Jae, a of the Pennsylvania Department of Corrections, seeking Compensatory Damages, a Declaratory Judgment, Court Costs, Filing Fees, Service Plaintiff's Attorney's Fees (if any) and a Jury trial based on Defendant's personal legal materials, law books, religious books, exercise showers, and inadequate ventilation & excessive heat stemming from a plexiglass shield over the Plaintiff's cell door. On April 23, 2001, Plaintiff's Second Set of Interrogatories and his Third Request for Production of Counsel for the Defendants in the above-entitled Civil Action. On June 11, 2001, Defendants, by counsel, responded to Plaintiff's Second Set of Interrogatories, by answering all Interrogatories except for Interrogatory No. 18, which they objected to. Defendants, by counsel, likewise then responded to Plaintiff's Third Request for Production of Documents, agreeing to provide all documents except Defendants failed to state they would provide the of Beard to Plaintiff's request to him. Contrary to Defendant's contention that the Documents requested would be pre for this Plaintiff's inspection, such documents have not been produced, as of this date. On June 11, 2001, Plaintiff sent letter to counsel for the Defendants, hereby advising him, of

agreement that such would be produced for plaintiff's inspection and advising him of Defendants' failure to state in their response to Plaintiff's Third Request for Production of Documents whether Beard's response to plaintiff's written request would be produced and explaining to the relevance of his request for Inmate Robert Adams' current prison address. Plaintiff also advised counsel for the Defendants, therein such same letter, that if Discovery dispute was not resolved by June 15, 2001, that on June 18, 2001, Plaintiff would file a Motion to Compel the same with this Court. Such dispute was not resolved by June 15, 2001, and thus, this plaintiff filing this Motion to Compel, herein this case. This is his Brief in support of Motion to Compel.

II. ARGUMENTS

A. DEFENDANTS HAVE FAILED TO PRODUCE THE DISCOVERY WHICH THEY INITIALLY AGREED TO PRODUCE FOR PLAINTIFF'S INSPECTION IN A TIMELY MANNER NOR AT ALL.

As stated above, on April 23, 2001, the Plaintiff sent his Third Request for Production of Documents to counsel for the Defendants, herein, and on Defendants responded to such and agreed to produce the Documents requested by the Plaintiff's inspection, except that Defendants failed to state whether they would produce Secretary Beard's response to Plaintiff's letter to him. In their response, stated the following:

"Defendants will make the documents available for review at a mutually convenient time. Plaintiff may make arrangements for the inspection by submitting a request slip to the assistant to the Superintendent. Photocopies may be secured at the plaintiff's expense at the usual institutional charge.

On June 5, 2001, Plaintiff Jare sent the request slip to make arrangements for inspection of these documents to the Assistant to the Superintendent, Ms. Sharon L. DeLoe. On June 6, 2001, Mr. Dan Davis responded to Plaintiff's Request Slip to Ms. DeLoe and stated:

"Mr. Jare, No such letter was received requesting that you are to inspect documents."

"I am not going to allow Plaintiff to inspect these documents."

on June 11, 2001, Plaintiff wrote & sent a letter to counsel for the Defendants, herein, Senior Deputy Attorney General Michael L. H. therein writing, advising him of this problem with discovery, being produced and requesting that he rectify such within an immediate phone call to the Superintendent's Assistant Mr. Sheryl Delet to Mr. Dan Davis hereat SCI-Greene and that he resolve this discovery problem and see to it that I am provided with the documents therein Plaintiff's Third Request for Production of Documents by Friday, June 15, 2001, but Defendants' counsel has not replied to such letter & no documents were produced for Plaintiff's Inspection by Friday, June 15, 2001.

On June 19, 2001, Dan Davis, SCI-Greene Administrative Assistant, brought down a packet of discovery materials to which he stated Defendants' counsel had faxed him for my inspection &

Upon reviewing these discovery materials, Plaintiff determined that counsel for the Defendants had failed to provide/produce December, 1999, & February & March, 2000, DC-141 PART III 30 DAY PRC REVIEW PAPERS, and Executive Deputy Secretary of Correction Beard's written response to Plaintiff's November 30, 1999, letter to him and that counsel for the Defendants had provided/produced the wrong January, 2000, DC-141 PART III 30 DAY PERIODIC REVIEW Paper, producing therein from SCI-Greene PRC (which was mistakenly been dated January, 2000, instead of for January, of the January, 2000, SCI-Camp Hill PRC Review Paper, which is the Plaintiff needed/needs. Plaintiff also discovered upon reviewing the copies of the discovery papers/materials, which counsel for the Defendants had faxed to Mr. Davis, had the words of Plaintiff's November 30, 1999, letter/request to Executive Deputy Secretary cut off at the sides and at the bottom of pages and that for the Defendants had failed to produce page-two of Plaintiff's November 28, 1999, Inmate Request Form to Deputy Falakovich. Plaintiff then there advised Mr. Davis of the above problems with the discovery materials/papers & asked him to contact counsel for the Defendants and have the problems corrected & all discovery produced by the end of the month. However, such was not done, despite Mr. Davis' promise to this Plaintiff. Based upon the above & foregoing facts, Plaintiff is attesting that the Defendants herein have failed to produce PRC

B. DEFENDANTS FAILED TO STATE IN THEIR RESPONSE TO PLAINTIFF'S THIRD REQUEST FOR PRODUCTION OF DOCUMENTS WHETHER THEY WOULD OR WOULD NOT PROVIDE EXECUTIVE DEPUTY SECRETARY BEARD'S RESPONSE TO PLAINTIFF'S LETTER TO HIM IN REPLY TO FED. R. CIV. P. 34(b).

In his PLAINTIFF'S Third Request for Production of Documents, at Paragraph 1, PLAINTIFF requests/states:

"Any and all letters which the PLAINTIFF wrote and sent to Executive Deputy Secretary of Corrections Beard and/or to Deputy Secretary of Corrections William Love, concerning the denial of his own personal law books and religious materials, showers and outside exercise in the SCI-Camp Hill RHU and/or about excessive heat poor ventilation problems in the RHU and/or about the plexiglass shield being placed over the PLAINTIFF's arrival door back in November and/or December, 1999 and the written replies sent to this inmate/PLAINTIFF on each of such letters."

On June 1, 2001, Defendants responded to such & stated as follows:

"Response: Defendants will produce PLAINTIFF's written request to Beard, Secretary of Corrections. No letters to Love from PLAINTIFF were found."

In the first place, PLAINTIFF's letter/request was written and sent to DR. Jeffrey A. Beard, Executive Deputy Secretary of Corrections, not to Beard, Secretary of Corrections, as Defendants state and, second of all, because such response fails to state whether Defendants will produce for inspection, Beard's response to such request to him from PLAINTIFF, and thus, Defendants have violated Fed. R. Civ. P. 34(b), which state/require:

"The party upon whom the request is served shall serve a written response within 30 days after service of the request."

"The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for the objection shall be stated."

and they have no

C. DEFENDANTS' OBJECTION, ON THE CLAIM OF PRIVILEGE, TO PLAINTIFF'S INTERROGATORY NO. 18 OF PLAINTIFF'S SECOND SET OF INTERROGATORIES FOR THE PRESENT LOCATION AND FULL PRISON ADDRESS OF INMATE ROBERT ADAMS, #CQ-2185, IS CONTRARY TO THE LAW OF PRIVILEGES.

In his second set of interrogatories, Interrogatory No. 18, Plaintiff asks: "What is the present location and full prison address of Inmate Robert Adams?"

In their Response to Plaintiff's Second Set of Interrogatories herein this case, Defendants object to Plaintiff's above-referenced Interrogatory No. 18, based on a claim of privilege, however, Defendants do so in a generalized fashion and they fail to explain why or how such information is privileged.

Under federal law regard privileges the mere assertion that information is "confidential" establishes no privilege enforceable in court. See Nuyen Da Yen v. Kissinger, 528 F.2d 1194 (9th Cir. 1975), Marshall v. United States, 351 F.2d 794, 795 (D.C. Cir. 1965), Martin v. Lamb, 143 U.S. 143 (U.S. 1988) and cases cited. Nor may privileges be asserted in a generalized fashion. Documents or information claimed to be privileged must be specifically designated and described. Fed. R. Civ. P. 26(b)(5). See also Kerr v. United States District Court, 192, 198-99 (9th Cir. 1975), aff'd, 426 U.S. 394, 96 S.Ct. 2119 (1976), Eurek Corp. v. Hartford Accident and Indemnity Co., 136 F.R.D. 179, 182 (E.D. Cal. 1991) and cases cited.

The government privilege is also subject to procedural requirements. It must be formally asserted and supported with specific facts and allegations. See United States v. Reynolds, 345 U.S. 1, 78, 73 S.Ct. 1147, 1153 (1953), Miller v. Fancucci, 141 F.R.D. 292, 300-01 (C.D. Cal. 1992) and Mobil Oil Corp. v. Dept. of Energy, 102 F.R.D. 1, 56 (N.D. Cal. 1983), Carfagna v. G, 9, 10-11 (D.D.C. 1972). Furthermore an improperly asserted claim of privilege is not enforceable. See Black v. Sheraton Corp. of America, 371 F.Supp. 97, 101 (D.C. Cal. 1974).

Plaintiff's Second Set of Interrogatories, as asserted by Defendant in a generalized fashion, is not specifically designated and described and such is not supported with specific factual allegations and thus such asserted claim of privilege is improperly asserted by the defendants, herein, thus, constituting a claim of privilege, and given such, Defendants should, by law, be compelled to provide an answer in full to Plaintiff's Interrogatory of his Second Set of Interrogatories, herein this case sub judice.

Furthermore, the governmental privilege does not cover everything that officials may want to keep secret. It is designed to protect "deliberative and decision making processes of government officials" and "investigative reports of an administrative agency to the extent that they reflect advisory rather than factual material." See Kinoy v. Mitchell, 67 F.R.D. 1, 10-11 (S.D.N.Y. 1975) (footnote omitted) accord, Kelly v. San Jose, 114 F.R.D. 653, 658-59 (N.D. Cal. 1987).

Plaintiff avers & submits, that, herein this case sub judice, the information which he has requested from the requested from the Defendants in Interrogatory No. 18 of his Second Set of Interrogatories, do seek any information which contains "deliberative and decision making processes of government officials" and/or "investigative reports of an administrative agency to the extent that they reflect advisory rather than factual material" and thus Plaintiff's motion to compel must, by law, granted, herein this case sub judice.

D. THE DISCOVERY SOUGHT IS RELEVANT TO THE CLAIMS AND DEFENSES IN THIS CASE.

Rule 26, Fed. R. Civ. P., permits discovery of matters "relevant" subject matter involved in the pending action. . . . It is not grounds for objection that the information sought will be inadmissible at the trial. Information sought appears reasonably calculated to lead to the discovery of admissible evidence." In the discovery stage, relevance is construed broadly to encompass any matter that bears, or that reasonably could lead to other matter that could bear on, any issue that or may be in the case." See Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351, 98 S.Ct. 2380 (1978) (footnote omitted) accord, Wetzel v. Amoco Oil Co., 142 F.R.D. 117 (N.D. Cal. 1982).

Discovery requests should be allowed unless it is clear that the information sought can have no possible bearing upon the subject matter of the action. La. Chemise La Coste v. Alligator Co., Inc., 184,171 (D. Del. 1973), Nash v. Telke, 743 F. Supp. 1306 (D. Va. 1990).

Each document sought by the Plaintiff is relevant to claims and defenses in this case, as is the information sought by Interrogatory No. 18 of Plaintiff's Second Set of Interrogatories. Each of such is relevant & necessary to prove the allegations in his complaint and/or is necessary to enable the Plaintiff to file his Brief in Opposition to Defendant's Motion for Summary Judgment and Memorandum in Support and to enable him to counter adequately and effectively defend against such summary judgment. Additionally, the information sought by Interrogatory No. 18 of Plaintiff's Second Set of Interrogatories is the present location and full prison address of Inmate Robert Adams, #CQ-2185, which is necessary and relevant to the claims and defenses in this more civil rights action, because of the fact that Inmate Robert Adams is a witness to and can give relevant testimony pertaining to the facts, allegations and claims of this Plaintiff's Initial and Amended Complaints herein in this case sub judice. Obviously, Plaintiff needs to be provided with the present location and address of Inmate Robert Adams, #CQ-2185, in order for him to call him as a witness at any time and at the trial in this case:

(W) HEREBY, based on the foregoing facts, arguments and authorities herein, this Plaintiff should grant the Plaintiff's Motion for full and/or Counsel for the Defendant to produce the originals of the documents for Plaintiff's review. (S) _____

Dated: 21st JUNE 2001 =

RESPECTFULLY SUBMITTED
John Richard
MR. JOHN RICHARD
#20-3219
SCI-Greenekmu
175 Progress Dr.
Waynesburg, PA 15393

Page: - One -

From The Desk Of:
MR. JOHN RICHARD JAE,
SCT - GREENE/SNU
175 Progress ~~Int'l~~
Waynesburg, PA 15370-8089
June 10, 2001

To: MR. Michael L. Harvey, SDA6
OFFICE OF THE ATTORNEY GENERAL OF PENNSYLVANIA
15th Floor, Strawberry Square
Harrisburg, PA 17100

Re: JAE vs. Kyler et al.
CIVIL No. 1:00-CV-00-035

DEAR MR. HARVEY:

I received Defendants' Response to Plaintiff's
Third Request For Production of Documents and Defendants'
Response to Plaintiff's Second Set of Interrogatories
the above-captioned CIVIL Rights Action, on June 4, 2001, and
immediately wrote a Request Stip to the Superintendent's
Assistant Ms. Sharon L. D'Eletto on such same date, request-
ing that she make arrangements for me to inspect the documents
in my Third Request For Production of Documents, as you had told
me to do, on p. 2 of Defendants' Response, and I sent such to her in the
Institutional mail on the next morning. On June 6, 2001, MR. Dan D.
Administrative Assistant here, responded back to me on my 6-4-01 Request
to Ms. D'Eletto and stated:

"Mr. Jae, No such letter was received requesting
that you are to inspect documents."

and refusing to produce such documents for my inspection
thus, interfering with discovery in the above-captioned case.

Mr. Harvey, I now write & send you this letter to request
as soon as you receive it you call down here to SCT - GREENE
speak with Ms. D'Eletto or MR. DAVIS here & get this discovery
problem straightened out & see to it that the documents
produced for my inspection & copying by Friday, June 15,

Mr. Michael L. Harvey, SDAG

June 10, 2001

Page: -two-

I now also advise you informally herein writing, that if I do not receive the documents requested in my Plaintiff's Third Request For Production of Documents, by Friday, June 15, 2001, for my inspection thereof the same and the other two problems mentioned in the enclosed Motion To Compel Discovery And Brief In Support are not corrected by Friday, June 15, 2001, on Monday June 18, 2001 I will file the originals of the enclosed Motion To Compel Discovery And Brief In Support, with the Court, in this case and you know what that means, when the Court grants such to me any discovery, you will have to provide such to me any and will also have to pay me my costs for having to file & serve such again, herein, so please, why don't you cooperate for once & let's try & resolve these discovery disputed problems informally without the Court's intervention & order, which will only cause unnecessary delay in these proceedings.

I request your immediate reply back to me on this letter in writing as soon as you receive such from me.

Your prompt consideration and response on this, & will be appreciated, as is requested, herein:-

Sincerely,

John R. Richard

(S) ~~Mr. John R. Richard~~
#BX-3217
CIT - Greene/SMU
INS Progress Drm
Waynesburg, PA. 153